Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ANR PIPELINE COMPANY, *et al.*,
Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION,
DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent,

Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause, as interpreted by this Court in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), prohibits state taxing officials from discriminating between railroads and other taxpayers, all of which are classified identically by the state legislature, by entering into side agreements with railroads to lessen their tax burden.

2. Whether the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, preempts state law property classifications or, instead, leaves states free to follow their own taxation schemes with uniform treatment within classes, as long as they comply with the federal standard of non-discrimination against railroad property.

PARTIES TO THE PROCEEDING

The following parties participated in the proceedings below and are petitioners: ANR Pipeline Company, Colorado Interstate Gas Company, Enron Liquids Pipeline Company, MAPCO Ammonia Pipeline, Inc., MAPCO Fractionator, Inc., Mid-America Pipeline Company, and Northern Natural Gas Company.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

The Coastal Corporation, through wholly owned intermediate subsidiaries, is the ultimate parent company of ANR Pipeline Company and Colorado Interstate Gas Company, neither of which has subsidiaries other than those wholly owned.

Enron Corp., through wholly owned intermediate subsidiaries, is the ultimate parent company of Northern Natural Gas Company, which has no subsidiaries.

Enron Liquids Pipeline Company has no parent company, though it is owned in part by Enron Corp., and has no subsidiaries other than those wholly owned.

MAPCO, Inc., through wholly owned intermediate subsidiaries, is the ultimate parent company of MAPCO Ammonia Pipeline, Inc., MAPCO Fractionator, Inc., and Mid-America Pipeline Company, none of which has subsidiaries other than those wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ANR Pipeline Company, Colorado Interstate Gas Company, Enron Liquids Pipeline Company, MAPCO Ammonia Pipeline, Inc., MAPCO Fractionator, Inc., Mid-America Pipeline Company, and Northern Natural Gas Company hereby petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 866 P.2d 1060 (Kan. 1994) and is included in the Appendix at pp. 1a-21a. The order of the Kansas Board of Tax Appeals is not reported and is included in the Appendix at pp. 22a-32a.

JURISDICTION

The decision of the Kansas Supreme Court was entered on January 21, 1994. Rehearing was denied on March 15, 1994. App. 33a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Article VI, Section 2 of the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, § 2.

The Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, is included in the Appendix at pp. 34a-35a.

Article 11, Section 1 of the Kansas Constitution as amended in 1985 is included in the Appendix at pp. 36a-38a.

STATEMENT

A. Factual Background

This Court has long recognized that natural gas is a vital resource providing millions of consumers with an inexpensive and environmentally responsible source of energy that can be found in abundant supply within the

United States.[1] It can be used for a multitude of purposes, from heating homes in the winter and fueling industry to powering combustion-turbine engines for the cogeneration of electricity. To reach consumers throughout the country, an interstate network of pipelines traverses the nation, providing an efficient, reliable, and clean method for transporting this fuel from its source of production. However, if the states through which these pipelines pass are allowed to single out pipelines by imposing higher taxes on them than on other similarly situated fuel transporters, consumers across the nation ultimately will face higher energy costs and will be deprived of the full benefits and advantages of this exceptional system of transportation for the cleanest of fossil fuels. By shifting the financial burden of taxes onto energy consumers nationwide, Kansas, through the tax scheme at issue in this case, is raising additional revenue for its own coffers.

Petitioners are six open-access common carriers that transport fuels such as natural gas or natural gas liquids in interstate commerce, and a "fractionator" which separates natural gas products for the shippers of natural gas. Railroads are open-access common carriers that also transport fuels in interstate commerce in competition with petitioners. Kansas law classifies both pipelines and railroads as "public utilities" and subjects them to precisely the same valuation and assessment for ad valorem taxes. Kan. Stat. Ann. § 79-5a01 (1989). However, for the tax years relevant to the petition, as well as before and after, the Kansas Director of Property Valuation of the Department of Revenue ("respondent") admittedly treated certain favored railroads in a grossly dissimilar way from all other public utilities—including pipelines and even other railroads.

The Kansas Constitution provides that the personal property of public utilities is to be assessed uniformly at 30% of value. Kan. Const. art. 11, § 1, 2(C), App. 37a.

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[1] *See, e.g., Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923).

The Kansas Constitution also provides that the property of pipelines and railroads together is to be assessed uniformly at 30% of value. *Id.* at 1(D), App. 37a. Petitioners' property, both real and personal, was assessed at no less than 30%. However, during these same tax years, respondent negotiated a special arrangement with certain railroads and assessed their real property below 30%. In addition, respondent exempted 80% of the railroads' personal property from taxes altogether, providing for an effective assessment rate of 6% of value (20% of property at 30% of value). However, 100% of the pipelines' personal property was taxed. Thus, under this special deal, the treatment received by the favored railroads in disregard of the state legislature's mandate was more favorable than that received by all other members of the subclass.

B. The 4-R Act

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"). The 4-R Act provided that if states imposed assessment ratios or tax rates on railroad property significantly higher than the ratios or rates levied on other commercial and industrial property within a state, those ratios or rates would be deemed to discriminate unreasonably against interstate commerce and their enforcement could be enjoined. See 49 U.S.C. § 11503(b) and (c), App. 34a-35a. Congress gave the states a three-year grace period within which to bring their taxation schemes into compliance. See Pub. L. No. 95-473, § 2(b), 92 Stat. 1337, 1466 (1978). Yet the Kansas legislature failed to so modify its laws. Even when it amended its constitution in 1985, Kansas classified railroads and pipelines together and required them to be taxed uniformly. Thus the Kansas legislature has concluded that, even in the wake of the 4-R Act, railroads and pipelines are similarly situated.

In 1989, several railroads brought suit in the United States district court in Kansas challenging the state's taxation scheme as discriminatory under the 4-R Act.

The action never proceeded to trial. Instead, respondent voluntarily agreed to give those railroads that had brought suit favorable tax treatment. For the 1989 tax year, respondent agreed to exempt 80% of the personal property of these railroads. *Burlington N. R.R.* v. *Rolfs*, 1989 Consent Decree, ¶¶ 14-15, 17. State law provided for no such exemptions, and none was granted to other railroads and public utilities, including petitioners. See Brief of Appellee, *In re ANR Pipeline Co.*, 866 P.2d 1060 (Kan. 1994) (No. 92-69116-AS), at 24. For the 1990 tax year, respondent once again granted those railroads challenging Kansas' tax law an 80% personal property exemption and additionally assessed their real property at only 25%. *Kansas City Terminal Ry.* v. *Rolfs*, 1990 Consent Decree, ¶¶ 14-15. For the 1991 tax year, respondent continued the same treatment, but assessed the real property of the railroads challenging Kansas' tax law at an even lower percentage, 22.3%. *Burlington N. R.R.* v. *Beshears*, 1991 Consent Decree, ¶¶ 19-20. Respondent has continued to give favorable tax treatment to select railroads in defiance of the legislative policy embodied in the Kansas Constitution and laws that railroads and pipelines should be treated identically. *Mid-Michigan R.R.* v. *Beshears*, 1992 Consent Decree, ¶¶ 19-20; *Burlington N. R.R.* v. *Parrish*, 1993 Consent Decree, ¶¶ 16-17.

C. Proceedings Below

Petitioners each brought an appeal before the Kansas Board of Tax Appeals (the "Board") from their assessments in the 1990 and 1991 tax years.[2] Since the underlying facts were not in dispute, these cases were presented to the Board—and to the Kansas Supreme Court on appeal—on stipulated facts. Petitioners argued that they were subclassified with railroads under state law, but not provided the same tax treatment afforded to the railroads

[2] Appeals from the tax treatment petitioners received in the 1989, 1992 and 1993 tax years are still pending before the courts.

by respondent. Petitioners argued that this disparate treatment violated the Equal Protection Clause of the Fourteenth Amendment, as well as the state constitution.

Although the Board acknowledged that it was "not at all convinced that the Decree [giving certain railroads favorable tax treatment] represents a valid application of the 4-R Act, nor that the result complies with the body of Kansas decisions," App. 27a, ¶ 12, the Board nevertheless denied petitioners any relief. The Board did so, however, without directly addressing petitioners' arguments.

On appeal, the Kansas Supreme Court was likewise "at a loss" to understand the basis upon which state taxing officials had conferred favorable tax treatment upon the railroads. App. 8a. No state policy justified that action. Nevertheless, the court construed the 4-R Act as having created a new state system of classification. It found that the 4-R Act had preempted the state's classification of railroads as public utilities. *Id.* at 12a, 18a-19a.

The state court admitted that the Board had not specifically addressed petitioners' equal protection argument. App. 19a. Nonetheless, without reference to any of this Court's equal protection decisions, the state court proceeded to reject the approach followed by the Nebraska Supreme Court and to endorse the poorly reasoned approach taken by an Alabama appellate court and the Supreme Court of Tennessee. Once it had found that the 4-R Act preempted state tax classifications of railroads, the court determined that the remaining members of the subclass were treated equally and that therefore there had been no violation of the Equal Protection Clause. *Id.* at 18a-19a.

REASONS FOR GRANTING THE PETITION

The decision of the Kansas Supreme Court raises two recurring and significant questions of federal law: First, whether state taxing officials are free to discriminate among taxpayers in violation of a state legislative policy that treats those taxpayers identically, without running afoul of the Equal Protection Clause of the Fourteenth Amendment. The decision below is flatly inconsistent with the holding of the Nebraska Supreme Court in a case involving precisely the same situation and the logic of the decision below squarely conflicts with the holding of this Court in *Allegheny Pittsburgh Coal Co.* v. *County Commission,* 488 U.S. 336 (1989). These decisional conflicts are explained and analyzed in Part IA, *infra.*

What makes review of these conflicts compelling is the profound economic consequences of the discriminatory practices employed by Kansas taxing officials. In Kansas alone, millions of dollars in taxes have been wrongfully collected in violation of the Fourteenth Amendment, which by itself is sufficient to warrant review by this Court. Compare *Barclays Bank, PLC* v. *Franchise Tax Bd.,* Nos. 92-1384, 92-1839, *cert. granted,* 114 S. Ct. 379 (Nov. 1, 1993). The widespread impact of the state's unlawful tax enforcement practice is fully explained in Part IB, *infra.*

The second important federal question raised by the decision below is whether the manifestly discriminatory treatment of the pipelines that violates state law can be justified on the basis that Section 11503(d) of the 4-R Act preempts state taxing officials from enforcing the state's policy of equal treatment. This Court's recent decision in *Department of Revenue* v. *ACF Industries, Inc.,* 114 S. Ct. 843 (1994), as well as more general preemption principles embodied in this Court's supremacy clause cases, completely undercuts the Kansas Supreme Court's analysis. Accordingly, at a minimum, this Court should remand this case to the court below to consider the im-

pact of *ACF* on its decision. This second issue is analyzed in greater detail in Part II, *infra*.

I.

A. The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In structuring taxation schemes " 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' " *Williams* v. *Vermont*, 472 U.S. 14, 22 (1985) (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). Nevertheless, this Court has held that the Equal Protection Clause prohibits a state from imposing an unequal ad valorem tax on different classes of property unless its classification of property "rationally furthers a legitimate state interest," and the distinctions it creates are not "arbitrary or irrational." *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2332 (1992). Specifically, the Court has held that the Equal Protection Clause prohibits the " '[i]ntentional systematic undervaluation' " of property within the same classification. *Allegheny*, 488 U.S. at 345 (quoting *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 353 (1918)).

Under *Allegheny*, states are not free to adopt as a matter of state law one set of legislative tax policies, but permit their taxing officials to implement a separate practice that promotes solely the economic interests of a favored class of taxpayers. This is precisely what Kansas has done in this case and the decision below condoning this discrimination warrants further review.

1. The decision of the Kansas Supreme Court directly conflicts with the decision of the Nebraska Supreme Court. In *Northern Natural Gas Co.* v. *State Board of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert.*

denied, 493 U.S. 1078 (1990), several companies with pipelines running through Nebraska challenged the state tax commissioner's provision of favorable tax treatment to several railroads. Nebraska's Constitution and statutes did not classify tangible property for differential treatment under its ad valorem taxation scheme. Nebraska law required that railroad and pipeline property—like all other tangible property—be assessed equivalently.

However, the Nebraska tax commissioner did not collect any personal property tax from certain railroads and car companies. The Nebraska Board of Equalization and Assessment also refused to enjoin the tax commissioner from collecting personal property taxes from the pipelines. The Nebraska Supreme Court, relying on this Court's decision in *Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441 (1923), found that the failure of the state tax officials to treat the property of railroads and pipelines in the same manner violated the Equal Protection Clause. *Northern,* 443 N.W.2d at 256. The Nebraska Supreme Court noted that it made no difference how the undervaluation had come to pass. *Id.* The undervaluation of the railroad property caused the valuations of the other property to be disproportionately high, when state law required the two to be equal. *Id.*

The Kansas court attempted to distinguish *Northern* solely on the basis that the Nebraska Constitution did not distinguish between railroad and other property. App. 15a. But Kansas law is no different from Nebraska law in this regard. Kansas tax law classifies railroads and pipelines together in the subclass of "public utilities." Kan. Stat. Ann. § 79-5a01(a) (1989) (defined as "every individual, company, corporation . . . or receivers that now or hereafter are in control, manage or operate a business of . . . [a] railroad or . . . pipeline[]"). As noted above, the Kansas Constitution, as well as its tax law, requires that the subclass of public utility personal property be assessed and taxed in the same manner and classifies the real property of railroads and pipelines in the same subclass. See

also App. 19a ("Art. 11, § 1 treats all public utility property alike"). The property of railroads and pipelines also is assessed centrally by respondent rather than by local county assessors. Kan. Stat. Ann. § 79-1404(15) (1989).

In sum, with respect to the only classification of property relevant to this case, Kansas has classified railroads and pipelines *together* as public utilities and it requires that public utilities be treated alike. Under state law, the property of railroads and pipelines is therefore similarly situated. Accordingly, railroad and pipeline property in both Kansas and Nebraska was treated identically as a matter of state law. As a consequence, the result reached by the Kansas Court upholding this taxing scheme in the instant case is flatly inconsistent with the decision of the Nebraska Supreme Court in *Northern* that this scheme violates the Fourteenth Amendment. Because this important and recurring question of the proper treatment of taxing schemes under the Equal Protection Clause has been resolved in conflicting ways by the highest courts of different states, the decision of the court below cries out for review by this Court.

2. The decision below also conflicts with the applicable decisions of this Court. The court below concluded, without discussing any relevant decisions of this Court, that the tax treatment the state had provided did not violate the Equal Protection Clause. However, because Kansas has established a taxation scheme classifying railroads and pipelines together, it cannot intentionally and systematically undervalue a favored taxpayer by enforcement practice without violating the equal protection rights of those whose property in the same subclass is taxed fully.

In *Allegheny* this Court examined West Virginia's ad valorem property tax system. The Court noted that " '[t]he equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' " 488 U.S. at 345 (quoting *Hillsborough* v. *Cromwell,* 326 U.S. 620, 623 (1946)). West

Virginia made no distinctions between the properties unequally assessed in Webster County. *Id.* at 345. Instead, the county assessor on her own initiative systematically assessed these similarly situated properties by a method that resulted in significantly different valuations. *Id.* at 338, 345. This Court unanimously held that such an "intentional systematic undervaluation" of some of the property in the state-created class violated the Equal Protection Clause, *id.* at 346, and did not rationally achieve the purposes of the state ad valorem property taxation scheme. See *Nordlinger*, 112 S. Ct. at 2335 (discussing *Allegheny*).[3]

In the tax years in question, respondent voluntarily and repeatedly provided certain railroads with favorable tax assessments for real property and also exempted the majority of these railroads' personal property from taxation altogether. Respondent's discriminatory practice of systematically undervaluing the properties of certain railroads amounted to an "aberrational enforcement policy" that this Court consistently has recognized as a violation of the Equal Protection Clause. *Allegheny*, 488 U.S. at 344 n.4 & 345; *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239 (1931) (undervaluation of shares of certain bank stocks within class); *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U.S. 23 (1931) (undervaluation of coal-rich land in same class but adjacent to river); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923) (undervaluation created by discounted assessments given other property in class); *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20 (1907) (undervaluation created by failure to carry out equalization for all corporations in class).

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[3] California's state-imposed ad valorem property taxation scheme, examined and upheld by this Court in *Nordlinger*, provided for the classification and valuation of property based on duration of ownership. California's disparate treatment of "similar" property, unlike West Virginia's or Kansas', specifically was designed by the state rationally to further legitimate state interests. *See Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2333 (1992).

The Kansas ad valorem property taxation scheme in the instant case, like the one in *Allegheny*, made no distinction between the properties subjected to unequal treatment, whether by law, implicit policy distinctions, see *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1940), or by mistake, see *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350 (1918). Respondent voluntarily and repeatedly gave certain railroads in the subclass favorable tax treatment not afforded to the rest of the class. But the state's policy continued to be uniform treatment for all public utilities. See App. 19a. Thus, as in *Allegheny*, no legitimate state interest is rationally furthered by the deliberate actions of respondent. Indeed, the Kansas Supreme Court, the final arbiter of state law, was "at a loss" to explain the basis for the disparate treatment. App. 8a. This is not surprising; no basis in legitimate state policy exists. Accordingly, the undervaluation of the property of only certain railroads deprived petitioners of equal protection under Kansas law.

B. Kansas' unlawful tax enforcement practice has an immediate and profound economic impact on petitioners. Petitioners own significant amounts of property in Kansas, though they do not participate in the political processes of the state since they are not residents or voters in the communities the pipelines pass through. As of 1991, petitioners' assessed property value in Kansas was approximately $117 million: $109 million in personal property and $8 million in real property. If the pipelines had received uniform treatment with railroads, $96.3 million of the assessed value of their personal property would not have been taxed. In 1991, petitioners paid approximately $12 million in property taxes. Railroads in the same subclass receiving special tax treatment paid only approximately $3 million for similar amounts of property that year.

Moreover, the broader effect of this type of disparate tax treatment against certain interstate common carriers

is widespread. In Kansas alone, 18 taxpayers—including such diverse entities as MCI Telecommunications Corp. and Kansas City Power & Light Company in addition to pipelines—currently are contesting their 1992 tax assessments. And claims like those brought by petitioners, asserting entitlement to equality in their tax treatment as compared to railroads receiving favorable treatment under the 4-R Act, are pending in several other States.[4] Therefore, the equal protection issue in this case not only presents jurisprudential conflicts that warrant this Court's resolution, but also imposes significant financial harms that justify this Court's review of the decision below.

II.

A. As previously explained, the Kansas Supreme Court recognized that the state constitution "treats all public utility property alike." App. 19a. In particular, it was stipulated that petitioners' pipeline property is in the same category as railroad property under the classification scheme established by the Kansas Constitution and statutes. *Id.* at 24a, ¶ 6. In addition to the general provision of Article 11 of the Kansas Constitution providing for "a uniform and equal basis of valuation and rate of taxation of all property," each of the provisions of the constitution

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[4] In Wisconsin, railroads and pipelines are in the same statutory classification, Wis. Stat. Ann. § 76.01 *et seq.* (West 1993), but state tax officials have been removing 80% of the railroads' personal property from the calculation of their unit values. *See, e.g., ANR Pipeline Co.* v. *Wisconsin Dep't of Revenue,* No. 93-CV-4343 (Wis. Cir. Ct. filed May 9, 1994). In Iowa, railroads and pipelines are treated legislatively the same in all respects, Iowa Code Ann. § 427A.1 (West 1993). However, railroads have been given an 80% exemption for their personal property by state taxing officials. *See, e.g., In re ANR Pipeline Co.,* No. 727 (Iowa St. Bd. Tax Rev. filed Jan. 21, 1994). In Louisiana, railroads and pipelines are classified together by the legislature as public service properties, La. Rev. Stat. Ann. § 47:1851(M) (West 1993). However, the state tax commission has been assessing railroads at 15% of fair market value. The public service properties being discriminated against are currently contemplating litigation.

defining subclasses of property directs that the "property shall be . . . assessed uniformly as to subclass." See *id.* at 36a-37a (quoted at App. 3a). Nevertheless, the Kansas Supreme Court rejected petitioners' argument that pipeline property was entitled to the same tax treatment as the State had given railroad property. *Id.* at 15a-16a.

The court offered no state-law reason for that holding. Instead, it concluded that the 4-R Act required more favorable treatment of railroads by taking railroad property out of the subclasses to which state law otherwise assigned it: "Railroad property was thereby made an exception to subclasses to which public utility property was assigned." *Id.* at 12a. Without regard to the state law mandate of uniformity within a state-law subclass, the state supreme court thus held that the 4-R Act on its own overrode the classifications of state law and necessarily precluded equal treatment of railroad property with other property classes.[5] This federal preemption ruling was the

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[5] The Kansas Supreme Court observed that the general constitutional clause mandating a "uniform and equal basis of valuation and rate of taxation" does not apply to the assessment rates given to the various classes (App. 12a). However, this holding provides no independent state-law basis for the decision below. First, the observation simply does not address the distinct question whether equal treatment of pipeline and railroad property is required by the *separate* state-law commands to apply assessment rates "uniformly as to subclass." The Kansas Supreme Court ignored that question and ruled that the 4-R Act displaced the state classification scheme. Second, the court's reading of the 4-R Act also allowed the court to avoid discussing whether the "uniform and equal basis" clause, even if it leaves "assessment rates" outside its reach, nonetheless applies to exemptions—which are treated separately from assessments under both the state constitution (*compare* Kan. Const. art. 11, § 1(b)(1) *with* § 1(b)(2) *and* the 4-R Act, 49 U.S.C. § 11503 (*see Department of Revenue* v. *ACF Indus., Inc.*, 114 S. Ct. 843 (1994)). Of course, a principal source of the discriminatory treatment of pipelines at issue here is the 80% exemption given to the personal property of certain railroads.

essential basis for the court's rejection of petitioners' claim.[6]

The preemption basis for the ruling below is confirmed by the reasons advanced by the state tax authorities for rejecting petitioners' uniformity claim—resting entirely on federal preemption, without reliance on any independent state-law ground that would dispute the existence of a state-law uniformity command.[7] The Board of Tax Appeals, in the decision reviewed by the Kansas Supreme Court, acknowledged that railroad and pipeline property fell within the same classification under the state constitution, *id.* at 24a, ¶ 6, and that the constitutional "principles of uniformity *within a class* continue to apply," *id.* at 30a, ¶ 22 (emphasis in original), so that state law of its own force required "uniformity within the class of utility property, both real and personal," *id.* at 30a-31a, ¶ 23. The Board concluded, however, that the 4-R Act overrode the state-law command: "the presence of federal legislation adopting a different standard for railroad property and no other utility property not only creates, but compels, a distinction to be made. We conclude that the 4-R Act creates an exception within the class of public utility property." *Id.* at 31a, ¶ 23. Thus, expressly relying on "federal preemption," *id.* at 29a, ¶ 19, the Board concluded that, regardless of any uniformity principle under the Kansas Constitution, the 4-R Act compelled favored treatment of railroads: "Kansas cases plainly state that uniformity is to be enforced to the ex-

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[6] This ruling is reviewable here even if the state court opinion framed its conclusion in part in terms of state law (App. 14a), since the reliance on a federal preemption ruling is clear. *See Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983); *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514-15 (1939).

[7] Any other position would have been surprising given how fundamental uniformity principles have been to state tax schemes in Kansas and elsewhere. *See, e.g., Kansas ex rel. Stephan* v. *Martin*, 608 P.2d 880 (Kan. 1980); *Greene* v. *Louisville & I. R.R.*, 244 U.S. 499 (1917); J. Hellerstein & W. Hellerstein, *State and Local Taxation* 46-49 (5th ed. 1988).

tent possible. . . . Here, however, the 4-R Act purportedly requires departure from the 30% standard set by Kansas Constitution, Article 11, Section 1(b)." *Id.* at 31a, ¶ 24.

In defending the Board of Tax Appeals' decision before the state supreme court, respondent made the same preemption argument. Respondent expressly recognized that "railroad property is required to be equalized with other public utility property." Brief of Appellee, *In re ANR Pipeline Co.*, 866 P.2d 1060 (Kan. 1994) (No. 92-69116-AS), at 7 (citing Kan. Const. art. 11, § 1 (1989)). Respondent contended, however, that the equalization standard of state law could not apply, giving one and only one reason: "the Kansas property tax classification system, as it pertains to rail transportation property, has been preempted by the 4-R Act and its classification system." *Id.* at 8. See also *id.* at 5 ("[t]he 4-R Act creates a federal property tax classification system for railroads that preempts inconsistent provisions of state property tax classification systems"); *id.* at 7, 10, 11.

B. The Kansas Supreme Court's preemption ruling is inconsistent with the most elementary principles of preemption analysis. Nothing in the 4-R Act creates a new federal classification system that automatically removes railroad property from the categories assigned by state law. Rather, by its plain terms, the 4-R Act requires nothing more than that railroad property be assessed and taxed at rates no higher than those applicable to commercial and industrial property (as defined). 49 U.S.C. § 11503(b), App. 34a-35a. As long as that result is produced, the 4-R Act has nothing to say about how a state classifies taxpayers or whether it insists on treating equally all taxpayers within a specified classification. See, *e.g.*, *ABF Freight Sys., Inc.* v. *Tax Div.*, 787 F.2d 292, 295-96 (8th Cir. 1986); *Arizona* v. *Atchison, T. & S.F. R.R.*, 656 F.2d 398, 408 (9th Cir. 1981); *Clinchfield R.R.* v. *Lynch*, 784 F.2d 545, 551 (4th Cir. 1986).

In particular, the 4-R Act nowhere in its text or policy precludes a state from requiring uniform treatment of

other public utilities to match the treatment required for railroads. The statute is a guarantee against state discrimination, not a federal mandate for favored treatment of railroads. See *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987) (4-R Act is "Congress' solution to the problem of discriminatory state taxation of railroads"); *Department of Revenue* v. *ACF Indus., Inc.*, 114 S. Ct. 843, 846 (1994). It would turn the equality guarantee of the 4-R Act on its head to read it as preempting state law that pursues the same principle of equality.

There simply is no inconsistency—in the sense of a direct conflict in requirements *or* frustration of congressional purposes—between a state insistence on pipeline-railroad equality and the federal commitment to a prescribed treatment of railroads. In *California Federal Savings & Loan Association* v. *Guerra*, 479 U.S. 272 (1987), this Court rejected a similar preemption argument involving a non-discrimination law and a law mandating a particular level of treatment for certain persons. This Court explained that the two laws were fully compatible, because both could be readily satisfied by affording all persons the specified level of treatment. *Id.* at 290-92; see *id.* at 295-96 (Scalia, J., concurring in the judgment).[8] Precisely the same compatibility is present here: Kansas may, with entire consistency, both meet its 4-R Act obligation to railroads and treat pipelines equally. Accordingly, there can be no preemption of a state's adherence to its classification scheme by affording pipelines the same treatment as the similarly classified railroads.

This conclusion is made inescapable by this Court's recent decision in *ACF*, 114 S. Ct. 843. First, the Court ex-

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[8] In *Guerra*, federal law provided for equal treatment and state law specified the level of treatment to be given. That fact, while it would have determined which principle prevailed if an inconsistency had been found, was irrelevant to the Court's determination that there was no inconsistency between the two laws at all.

plained there that any construction of the 4-R Act that expands its preemptive scope must be especially clear and manifest in the statute, because the statute impinges on traditional state powers of taxation. *Id.* at 850-51. See also *BFP* v. *Resolution Trust Corp.*, 62 U.S.L.W. 4359, 4363 (U.S. May 23, 1994). If the Kansas Supreme Court's broad finding of 4-R Act preemption of state classifications cannot be defended under ordinary preemption principles, it is even more starkly indefensible under that special standard. Second, and more particularly, *ACF* held that the 4-R Act, while speaking explicitly to assessment and tax rates, generally does *not* have preemptive effect with respect to a State's property tax exemptions. 114 S. Ct. at 850 (statute "reflects a determination to permit the States to leave their exemptions in place"). After *ACF*, then, the 4-R Act cannot be read as displacing state equalization requirements as applied to state taxing authorities' exemption decisions—the principle basis of petitioners' challenge relating to personal property. The Kansas Supreme Court decision is thus flatly inconsistent with *ACF*.[9]

C. The Kansas Supreme Court's conclusion that the 4-R Act completely displaces state classification schemes is inconsistent with the conclusion of the federal courts of appeals. See *supra* at p. 16. Moreover, the state court's holding is inconsistent with the result reached by the Nebraska Supreme Court in *Northern Natural Gas Co.* v. *State Board of Equalization & Assessment*, 443 N.W. 2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990). Applying the uniformity clause of the state constitution, the Nebraska Supreme Court held that a pipeline was entitled to the same tax treatment for its personal property as the state, acting pursuant to the 4-R Act, had afforded railroad property. *Id.* at 255-56, 260. That is

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[9] *ACF* was decided three days after the decision below. Although the Kansas Supreme Court was asked to consider *ACF* on rehearing, the court refused. Accordingly, a remand for such consideration ordered by this Court would be appropriate.

precisely the relief denied to petitioners by the Kansas Supreme Court, which expressly rejected *Northern*. App. 15a.

The issue is hardly an isolated one. In addition to the several other public-utility taxpayers with the same claim pending in Kansas, see *supra* at p. 13, the issue has arisen in other states. The issue already has been decided incorrectly in two states whose courts have reached the issue. In Tennessee, the state supreme court held that the 4-R Act "preempted the state classification of railroads" and accompanying state-law guarantee of "equal and uniform" tax treatment. *Federal Express Corp.* v. *Tennessee State Bd. of Equalization*, 717 S.W.2d 873, 876 (Tenn. 1986). See App. 17a-18a. See also *Alabama* v. *Colonial Pipeline Co.*, 471 So. 2d 408, 412-13 (Ala. Civ. App. 1984) ("the state is specifically forbidden to classify the property of motor carriers as Class I property by [the 4-R Act]"). And, as noted above, *supra* at p. 13 n.4, claims such as these are pending in several other states that do not classify railroads and pipelines separately. This Court should clarify the effect, if any, of preemption on state classifications by the 4-R Act in this recurrent circumstance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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